

No. 92-1639

Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1993

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CITY OF CHICAGO, *et al.*,  
v. *Petitioners,*

ENVIRONMENTAL DEFENSE FUND, INC., *et al.*,  
*Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals  
for the Seventh Circuit

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BRIEF OF THE NATIONAL LEAGUE OF CITIES,  
U.S. CONFERENCE OF MAYORS, NATIONAL  
GOVERNORS' ASSOCIATION, INTERNATIONAL  
CITY/COUNTY MANAGEMENT ASSOCIATION,  
NATIONAL ASSOCIATION OF COUNTIES, COUNCIL  
OF STATE GOVERNMENTS, AND NATIONAL  
INSTITUTE OF MUNICIPAL LAW OFFICERS  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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### QUESTION PRESENTED

Whether Section 3001(i) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6921(i), which provides that a "resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be treating, storing, disposing of, or otherwise managing hazardous waste," exempts from hazardous waste regulation the ash residue remaining from the burning of municipal solid waste at such a facility.

## TABLE OF CONTENTS

	Page
QUESTION PRESENTED .....	i
TABLE OF AUTHORITIES .....	v
INTEREST OF THE <i>AMICI CURIAE</i> .....	1
INTRODUCTION AND SUMMARY OF ARGUMENT .....	2
A. Resource Recovery Is A Critical Aspect Of MSW Management .....	2
B. Requiring MSW Ash To Be Managed As A Subtitle C Waste Substantially Raises The Cost Of MSW Disposal And Renders Resource Recovery Facilities Economically Unviable .....	6
C. Summary Of Argument .....	9
ARGUMENT .....	11
THE COURT OF APPEALS' INTERPRETATION OF SECTION 3001 (i) CONTRAVENES THE PLAIN LANGUAGE OF THE STATUTE AND CONGRESS'S PURPOSE IN ENACTING IT .....	11
A. MSW Ash Is A Treatment Residue That Is Excluded From Subtitle C Regulation Under The Express Terms Of Section 3001 (i) .....	12
B. The History Of § 3001 (i) Demonstrates That Congress Intended To Exempt The Entire MSW Stream From Regulation Under Subtitle C .....	17
C. The Court Of Appeals' Interpretation Contravenes The Congressional Purpose Underlying Section 3001 (i) .....	20

## TABLE OF CONTENTS—Continued

	Page
1. The Court of Appeals' Decision Contravenes the Congressional Purpose of Promoting the Development of Resource Recovery Facilities .....	21
D. If The Language Of The Statute Is Ambiguous And The Legislative History Inconclusive, The Court Should Defer To EPA's Interpretation .....	23
CONCLUSION .....	27

## TABLE OF AUTHORITIES

CASES:	Page
<i>American Mining Congress v. Environmental Protection Agency</i> , 824 F.2d 1177 (D.C. Cir. 1987) ..	13-14
<i>Chemical Waste Management, Inc. v. Hunt</i> , 112 S.Ct. 2009 (1992) .....	8
<i>Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984) .....	11, 24, 25, 26
<i>Crandon v. United States</i> , 494 U.S. 152 (1990) .....	11, 17, 20, 21
<i>Edison Elec. Inst. v. Environmental Protection Agency</i> , Nos. 90-1320-1324 (D.C. Cir. Aug. 6, 1993) .....	14
<i>Environmental Defense Fund v. Environmental Protection Agency</i> , 852 F.2d 1316 (D.C. Cir. 1988), <i>cert. denied</i> , 109 S.Ct. 1120 (1989) .....	12
<i>Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.</i> , 725 F. Supp. 758 (S.D.N.Y. 1989), <i>aff'd</i> , 931 F.2d 211 (2d Cir.), <i>cert. denied</i> , 112 S. Ct. 453 (1991) .....	20
<i>K Mart Corp. v. Cartier, Inc.</i> , 486 U.S. 281 (1988) .....	11
<i>Pennsylvania Public Welfare Dept. v. Davenport</i> , 495 U.S. 552 (1990) .....	11
<i>Rust v. Sullivan</i> , 111 S.Ct. 1759 (1991) ..	24, 25, 26, 26-27
<i>Securities Industry Ass'n v. Board of Governors</i> , 468 U.S. 137 (1984) .....	11
<i>Sullivan v. Everhart</i> , 494 U.S. 83 (1990) .....	24
<i>United States v. Nordic Village, Inc.</i> , 112 S.Ct. 1011 (1992) .....	17

## TABLE OF AUTHORITIES—Continued

Page

## STATUTES:

Resource Conservation and Recovery Act, 42 U.S.C.  
§§ 6901-6992k (1988)

42 U.S.C. § 6901 (b) (8) .....	21
42 U.S.C. § 6901 (d) .....	21
42 U.S.C. § 6903 (3) .....	12, 16, 17
42 U.S.C. § 6903 (5) .....	14
42 U.S.C. § 6903 (6) .....	12
42 U.S.C. § 6903 (7) .....	16, 17
42 U.S.C. § 6903 (24) .....	15
42 U.S.C. § 6903 (27) .....	13
42 U.S.C. § 6903 (34) .....	12, 15, 17
42 U.S.C. § 6913 .....	21
42 U.S.C. § 6921 (i) .....	<i>passim</i>
42 U.S.C. § 6924 .....	6-7
42 U.S.C. § 6925 .....	6-7
42 U.S.C. § 6942 (c) (10) .....	21
42 U.S.C. § 6943 .....	22
42 U.S.C. § 6948 .....	21

Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 32, 1980 U.S.C.C.A.N. (94 Stat.) 2334 .....	22
Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, § 223, 1984 U.S.C.C.A.N. (98 Stat.) 3221, 3252 .....	19

## REGULATIONS:

40 C.F.R. pt. 258 (1992) .....	5, 11, 26
40 C.F.R. pt. 261 App. II (1992) .....	14
40 C.F.R. § 261.2 (1992) .....	14
40 C.F.R. § 261.3 (1992) .....	14
40 C.F.R. § 261.4 (b) (1) (1992) .....	18

## TABLE OF AUTHORITIES—Continued

Page

40 C.F.R. § 261.24 (1992) .....	14
45 Fed. Reg. 33,084 (1980) .....	10, 15, 18
45 Fed. Reg. 33,088-89 (1980) .....	18-19
45 Fed. Reg. 33,097 (1980) .....	18
45 Fed. Reg. 33,099 (1980) .....	15, 18
45 Fed. Reg. 33,120 (1980) .....	10, 18
50 Fed. Reg. 28,702 (1985) .....	11, 25
50 Fed. Reg. 28,726 (1985) .....	11, 25
56 Fed. Reg. 50,978 (1991) .....	3, 26
56 Fed. Reg. 50,992 (1991) .....	3
56 Fed. Reg. 51,000-15 (1991) .....	5
56 Fed. Reg. 51,040 (1991) .....	26

## LEGISLATIVE HISTORY:

H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. (1984), <i>reprinted in</i> 1984 U.S.C.C.A.N. 5576 .....	19
H.R. Rep. No. 1491, 94th Cong., 2d Sess. (1976), <i>reprinted in</i> 1976 U.S.C.C.A.N. 6238 .....	21, 22
S. Rep. No. 284, 98th Cong., 1st Sess. (1983) .....	10, 19, 20
122 Cong. Rec. H11147 (Sept. 27, 1976) .....	22
122 Cong. Rec. H11153 (Sept. 27, 1976) .....	22
Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Transportation and Hazardous Materials of the House Comm. on Energy and Commerce, 101st Cong., 1st Sess. (1989) .....	8

## MISCELLANEOUS:

B. Kent Burton & Jonathan V.L. Kiser, <i>Energy from Municipal Waste: Picking Up Where Re- cycling Leaves Off</i> , Waste Age, Nov. 1992 .....	6
Richard W. Goodwin, <i>Defending the Character of Ash</i> , Solid Waste & Power, Sept./Oct. 1992 .....	5
William Gruber, <i>TSD Summary 1993</i> , EI Digest, January 1993 .....	8



## TABLE OF AUTHORITIES—Continued

	Page
Jonathan V.L. Kiser, <i>Municipal Waste Combustion in North America: 1992 Update</i> , Waste Age, Nov. 1992 .....	4
Martin V. Melosi, <i>Garbage in the Cities</i> (1981) .....	3
National League of Cities, <i>City Fiscal Conditions in 1991</i> (1991) .....	7
National Solid Waste Management Association, <i>Landfill Capacity in the Year 2000</i> (1989) .....	3, 8
Homer A. Neal & J.R. Schubel, <i>Solid Waste Management and the Environment—The Mounting Garbage and Trash Crisis</i> (1987) .....	3, 6, 9, 23
Walter R. Niessen, <i>Municipal Waste Combustors: Environmentally Sound Power Plants</i> , Solid Waste & Power, Jan./Feb. 1993 .....	4
Jeffrey D. Smith, <i>Hazardous Waste Landfill Facility Information</i> , EI Digest, March 1992 .....	8
<i>The 1992 Municipal Waste Combustion Guide</i> , Waste Age, Nov. 1992 .....	9
U.S. Department of Commerce, <i>City Government Finances 1989-90</i> .....	7
U.S. Department of Energy, <i>National Energy Strategy</i> (1st ed. 1991/1992) .....	6
U.S. Environmental Protection Agency, <i>Characterization of Municipal Solid Waste in the United States: 1990 Update</i> , EPA/50-SW-042 (June 1990) .....	2, 4
U.S. Environmental Protection Agency, <i>Characterization of Municipal Solid Waste in the United States: 1992 Update</i> , EPA/530-R-92-019 (July 1992) .....	2, 4
U.S. Environmental Protection Agency, <i>Environmental Fact Sheet</i> , EPA/50-W-0-29C (April 1990) .....	5
U.S. Environmental Protection Agency, <i>Solid Waste Disposal in the United States</i> , Executive Summary, EPA/530-SW-88-011A (Oct. 1988) .....	3

## TABLE OF AUTHORITIES—Continued

	Page
U.S. Environmental Protection Agency, <i>Memorandum from the Administrator to Regional Administrators Regarding Exemption for Municipal Waste Combustion Ash from Hazardous Waste Regulation</i> (Sept. 18, 1992) .....	passim

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**INTEREST OF THE *AMICI CURIAE***

*Amici*, organizations whose members include municipal, county, and state governments and officials throughout the United States, have a compelling interest in legal issues that affect local and state governments. *Amici* have a manifest interest in the legal issues pertaining to the responsible and efficient disposal of municipal solid waste ("MSW") since waste disposal is typical of the services

performed by state and local governments in discharging their functions of administering the public law and furnishing public services.

Jurisdictions around the country, faced with the prospect of diminishing MSW landfill capacity, increasing landfill tipping fees, greater difficulties in siting new landfills, and increased energy demand, have invested heavily in resource recovery and combustion systems to manage MSW and serve energy needs. In addition to their fiscal interest in the issue presented, *amici* also have an interest in preserving the ability of municipalities to address local environmental issues. Because of the importance of the question presented to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.<sup>1</sup>

## INTRODUCTION AND SUMMARY OF ARGUMENT

### A. Resource Recovery Is A Critical Aspect Of MSW Management

This country faces a severe problem in managing its municipal garbage, principally attributable to two factors. First, the amount of MSW generated in the U.S. is increasing. Between 1988 and 1990, MSW generated in the U.S. increased by 8%, from 180 million tons per year to 195.7 million tons per year.<sup>2</sup> The EPA has recently estimated an increase of 13% in MSW generation by the year 2000, to a total of 222 million tons per year.<sup>3</sup>

<sup>1</sup> The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

<sup>2</sup> See U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1992 Update*, EPA/530-R-92-019, ES-3 (July 1992) (hereinafter *EPA 1992 Update*); U.S. Environmental Protection Agency, *Characterization of Municipal Solid Waste in the United States: 1990 Update*, EPA/50-SW-042, ES-3 (June 1990) (hereinafter *EPA 1990 Update*).

<sup>3</sup> See *EPA 1992 Update* at ES-3.

Second, MSW landfill space, a finite resource, is becoming scarcer. While there were approximately 10,000 operating MSW landfills in 1970, only approximately 6,500 remained in operation by 1988.<sup>4</sup> Moreover, many of these landfills will be forced to close as a consequence of regulations promulgated by the EPA in 1991.<sup>5</sup> The combination of these two factors has led to an emerging national MSW landfill capacity shortage.<sup>6</sup>

Incineration plays a significant role in MSW management. In 1938, approximately 600 to 700 cities and towns burned their garbage and rubbish.<sup>7</sup> However, use of incineration waned as landfilling became more economical, and by 1970 only 160 incinerators and resource recovery facilities were in operation.<sup>8</sup> Today, resource recovery facilities and incinerators have again become a vital part of the MSW management system and are increasingly important due to the shortage of landfill space. Incineration reduces pressure on landfill capacity by reducing the volume of MSW by up to 90% and the mass by approximately 75%.<sup>9</sup> Incineration burns away

<sup>4</sup> *Solid Waste Disposal Facility Criteria* (Final Rule) 56 Fed. Reg. 50,978, 50,988 (1991); U.S. Environmental Protection Agency, *Report to Congress, Solid Waste Disposal in the United States*, EPA/530-SW-88-011A, Executive Summary at 1 (October 1988).

<sup>5</sup> See 56 Fed. Reg. 50,992 (1991).

<sup>6</sup> National Solid Waste Management Association, *Landfill Capacity in the Year 2000*, at 4 (1989) ("[D]isposal requirements will exceed existing capacity by around 1998."). Although recently, due to the economic recession and greater efforts at recycling, the rate at which landfill space is diminishing has decreased, long-term projections of landfill scarcity are well-founded.

<sup>7</sup> Martin V. Melosi, *Garbage in the Cities* 217 (1981).

<sup>8</sup> *Id.*

<sup>9</sup> Homer A. Neal & J.R. Schubel, *Solid Waste Management and the Environment—The Mounting Garbage and Trash Crisis* 117 (1987).



the organic (carbon based) compounds in the MSW, leaving the non-burnable metal components of the original MSW concentrated in the reduced volume of ash which is the treatment residue.<sup>10</sup> Jurisdictions which burn portions of the MSW stream and then landfill the ash residue reduce their landfill tipping fees and transportation costs significantly. As of November 1992, 176 resource recovery facilities and incinerators burned nearly 34 million tons of MSW annually, or 17% of the nation's total MSW stream.<sup>11</sup> If the 49 projects that are currently inactive or in the planning and construction stages are completed and become operational, capacity will increase to approximately 47 million tons per year, or 21% of the estimated total volume of MSW that will be generated in the year 2000.<sup>12</sup>

In addition to reducing use of landfill space, resource recovery facilities provide other substantial environmental and economic benefits. The EPA has concluded that the resource recovery process is environmentally safer and, therefore, preferable to the landfilling of MSW.<sup>13</sup> Resource recovery facilities and incinerators must comply with strict emissions requirements promulgated pursuant to the Clean Air Act.<sup>14</sup> Moreover, EPA's recent promulga-

<sup>10</sup> The only potentially environmentally threatening components in the MSW ash—unburnable metals such as lead and cadmium—are not created by the incineration, but exist in the untreated MSW, which can be lawfully disposed of in a Subtitle D landfill.

<sup>11</sup> Jonathan V.L. Kiser, *Municipal Waste Combustion in North America: 1992 Update*, Waste Age, Nov. 1992, at 28.

<sup>12</sup> *Id.* at 30.

<sup>13</sup> See EPA 1992 Update at 1-4; EPA 1990 Update at 4.

<sup>14</sup> See Walter R. Niessen, *Municipal Waste Combustors: Environmentally Sound Power Plants*, Solid Waste & Power, Jan./Feb. 1993, at 12 ("Municipal waste combustors are required to meet some of the toughest environmental air emission standards in the country. Complying with these standards makes modern waste combustors among the cleanest producers of electricity.").

tion of more stringent requirements to govern Subtitle D non-hazardous waste landfills receiving MSW ash has contributed to the increased safety of MSW ash disposal.<sup>15</sup> Recent field studies of ash and leachates from ash monofills show that lead and cadmium in MSW ash do not pose a significant threat to the environment or to public health and safety.<sup>16</sup> These studies indicate that with appropriate management, MSW ash is safe for re-use in applications such as substitute material in cement, in road

<sup>15</sup> See 40 C.F.R. pt. 258 (1992); 56 Fed. Reg. 51,000-15 (1991). These more stringent requirements include: location restrictions; stricter operating requirements such as covering disposals; record-keeping and controlling run-off; better design criteria that include denser liners and leachate collection systems; groundwater monitoring; and closure and post-closure care. Given the stricter standards for ash monofills, EPA has determined that MSW ash can be regulated under Subtitle D in a manner that "protects both the environment and public safety." See Memorandum from William K. Reilly, Administrator, U.S. EPA, to All Regional Administrators, Subject: Exemption for Municipal Waste Combustion Ash From Hazardous Waste Regulation Under RCRA Section 3001(i), at 4 (September 18, 1992) (hereinafter MWC Ash Memorandum) (reprinted as Appendix to Brief for the United States as Amicus Curiae, No. 91-1328). See also U.S. Environmental Protection Agency, *Environmental Fact Sheet*, EPA/50-W-0-29C (April 1990) (hereinafter Fact Sheet) ("The disposal of ash in a well-designed monofill greatly reduces the leachability of constituents of concern such as lead and cadmium.").

<sup>16</sup> Prior studies of MSW ash were based on laboratory testing. However, ash taken directly to a laboratory for analysis does not behave in the same way as ash disposed of in monofills or ash prepared for re-use. See Richard W. Goodwin, *Defending the Character of Ash*, Solid Waste & Power, Sept./Oct. 1992, at 18. Field tests show that MSW ash exhibits an encapsulating quality such that potentially harmful constituents like cadmium and lead bind up in the ash and are not released into the environment. *Id.* at 20. Moreover, heavy metal concentrations in ash diminish over time and recent studies show that leachate values from ash monofills approximate EPA's Primary Drinking Water Standards. *Id.*

construction, as daily cover for MSW landfills, or as a monofill liner.<sup>17</sup>

Another benefit of resource recovery facilities is the significant economic advantage they provide in the energy field. One ton of MSW burned in a resource recovery plant provides enough energy to light one thousand 100-watt light bulbs for one hour, power 500 hair dryers for one hour, or furnish electricity to an average apartment for one month.<sup>18</sup> Over 31 million tons of MSW are burned annually, producing enough energy to power the equivalent of 1.3 million homes, an increase of approximately 18% since 1990.<sup>19</sup> The EPA forecasts that between 1991 and 2010, the generation of electricity from MSW combustion will increase seven-fold.<sup>20</sup> Moreover, a portion of the energy generated by resource recovery facilities is used to operate the plants themselves, making the facilities self-sufficient. The remainder is sold and the proceeds applied to the facilities' operating expenses, further reducing the cost of MSW disposal to local governments.

**B. Requiring MSW Ash To Be Managed As A Subtitle C Waste Substantially Raises The Cost Of MSW Disposal And Renders Resource Recovery Facilities Economically Unviable**

The decision below requires that resource recovery facility operators dispose of MSW ash only at landfills which have obtained applicable state or federal hazardous waste treatment, storage and disposal permits under the strict requirements of Subtitle C of RCRA, 42 U.S.C.

<sup>17</sup> *Id.* at 24.

<sup>18</sup> Neal & Schubel, *supra* note 9, at 108.

<sup>19</sup> B. Kent Burton & Jonathan V.L. Kiser, *Energy from Municipal Waste: Picking Up Where Recycling Leaves Off*, Waste Age, Nov. 1992, at 38.

<sup>20</sup> U.S. Department of Energy, *National Energy Strategy* 126 (1st ed. 1991/1992).

§§ 6924, 6925. At a time when many of the nation's cities are in the midst of serious fiscal crises, the court of appeals' decision exacerbates this situation by substantially raising the costs of MSW disposal.<sup>21</sup> As a consequence of the stricter requirements imposed by Subtitle C, the cost of disposing of MSW ash in a hazardous waste landfill is substantially greater than it is in either MSW landfills or in ash monofills. According to the EPA, the national average cost of disposing of MSW ash in a Subtitle D landfill is \$42 per ton, while the national average cost of disposing of MSW ash in a Subtitle C landfill is \$453 per ton. MWC Ash Memorandum at 7.

Municipalities have chosen resource recovery as an integral part of their waste management programs because of its long term economic and energy benefits, and because it is environmentally safer than landfilling MSW. But even with these benefits, municipalities will not be able to absorb the dramatic increase in operating costs that will result if MSW ash must be disposed of in Subtitle C facilities. Furthermore, if all the MSW ash currently produced (some 8.5 million tons annually) is diverted to hazardous waste landfills, hazardous waste landfill charges are likely to increase significantly because of the added demand for limited hazardous waste landfill ca-

<sup>21</sup> A 1991 study by the National League of Cities documents the financial plight of the cities. Almost 61% of the cities surveyed reported that 1991 general fund expenditures were expected to exceed revenues; over 26% said that expenditures would exceed revenues by more than 5%. National League of Cities, *City Fiscal Conditions in 1991*, at iii (1991) (*City Fiscal Conditions*). In the period 1988-1990, municipal solid waste management costs rose at a rate 30% greater than city revenues. U.S. Dept. of Commerce, *City Government Finances 1989-1990*, at 1. As a consequence, 66.3% of the cities responding to the NLC survey reported that the cost of solid waste disposal was one factor beyond their control contributing to fiscal difficulties. *City Fiscal Conditions* at 31. Over 10% of cities reported that landfill, refuse, solid waste and recycling expenses comprise the single factor that most adversely affects city expenditures. *Id.* at 7.



capacity.<sup>22</sup> Only one hazardous waste landfill has been sited since 1987,<sup>23</sup> and there are only 20 hazardous waste landfills throughout the country.<sup>24</sup> See generally *Chemical Waste Management, Inc. v. Hunt*, 112 S.Ct. 2009, 2011-12 (1992).

The fiscal consequences of requiring MSW ash to be disposed of in Subtitle C hazardous waste landfills are best illustrated by representative examples from various communities. Hennepin County, Minnesota has advised *amici* that its estimated cost to dispose of MSW ash as a hazardous waste is \$150 to \$200 per ton. This is three to four times the \$50 per ton which the county pays for ash disposal in a MSW landfill or monofill. Moreover, the cost is approximately six to seven times the national average for tipping fees at MSW landfills, which is \$26.56 per ton.<sup>25</sup> New York City, which incinerates over one million tons of MSW annually, estimates that its disposal cost per ton would increase from approximately \$100 to over \$300 if MSW ash is designated as hazardous. This would increase New York's MSW disposal costs by over \$200 million per year. By way of comparison, its cost of diverting the MSW waste stream directly to a MSW landfill without any incineration is only \$30 per ton.<sup>26</sup>

<sup>22</sup> At the end of 1987 the United States had an estimated 34 million tons of hazardous waste landfill capacity. *Regulation of Municipal Solid Waste Incinerators: Hearings on H.R. 2162 Before the Subcomm. on Energy and Commerce, 101st Cong., 1st Sess. 198* (1989).

<sup>23</sup> Jeffrey D. Smith, *Hazardous Waste Landfill Facility Information*, EI Digest, Mar. 1992, at 24.

<sup>24</sup> William Gruber, *TSD Summary 1993*, EI Digest, Jan. 1993, at 14, 17.

<sup>25</sup> Landfill Capacity in the Year 2000, *supra* note 6, at 4.

<sup>26</sup> Akron, Ohio, estimates that the cost of landfilling one ton of MSW is \$50; the cost of incinerating one ton of MSW and landfilling the ash in a MSW landfill is \$57; and the cost of incinerating one ton of MSW and disposing of the ash in a hazardous waste landfill is \$92. Thus, for Akron, it would cost almost twice as much to burn a ton of MSW and take the residue to a hazardous waste

As these examples show, affirmance of the court of appeals' decision will substantially increase the costs of MSW disposal. It will also create a great economic disincentive to the development of new resource recovery facilities. The 40 plants currently in the planning or construction stages involve enormous development costs; as one authority has noted, in 1985 the cost of building a resource recovery facility capable of processing 1000 tons of MSW per day was \$80 million.<sup>27</sup> *Solid Waste Management and the Environment*, *supra* at 117. The surcharge imposed by requiring MSW to be disposed of under Subtitle C can only lead to the cancellation of those facilities not yet completed and jeopardize the economic viability of existing facilities.

### C. Summary Of Argument

1. The plain language of § 3001(i) manifests Congress's intent to exclude the entire MSW stream from regulation as a hazardous waste under RCRA's Subtitle C. The court of appeals' construction misapprehends the import of the inclusion by Congress in § 3001(i) of the terms "treating," "disposing of," and "managing." Not only does § 3001(i)'s use of these terms demonstrate that Congress intended to exempt the MSW waste stream from

landfill than to simply dispose of the untreated MSW in a sanitary landfill. For Marion County, Oregon, landfilling MSW ash as a hazardous waste would almost double the cost of MSW disposal, raising it from the current cost of \$46.95 per ton to \$80.10 per ton. This can be compared with its cost of \$36 per ton to send MSW directly to a landfill.

<sup>27</sup> The jurisdictions with publicly owned resource recovery facilities in the advanced planning or construction stages include: Lisbon, Connecticut; Lee County, Florida; Montgomery County, Maryland; Oakland County, Michigan; Dakota County, Minnesota; St. Louis, Missouri; Mercer County, New Jersey; Monmouth County, New Jersey; Morris County, New Jersey; Union County, New Jersey; Mecklenburg County, North Carolina; Montgomery County, Pennsylvania; Kingston, Rhode Island; Johnston, Rhode Island; Nashville, Tennessee; and Brazoria County, Texas. *The 1992 Municipal Waste Combustion Guide*, Waste Age, Nov. 1992, at 56.

Subtitle C regulation, the very process of incineration falls within the statutory definition of "treating," which is specifically exempted from regulation under Subtitle C. Moreover, a resource recovery facility's subsequent disposal of MSW ash residue is also exempt from regulation under Subtitle C because it involves the statutorily exempt activity of "disposing of" residue.

2. The history of § 3001(i) supports this conclusion. In 1980, EPA, while recognizing that MSW might contain a small amount of hazardous waste, promulgated the Household Waste Exclusion Rule which excluded the entire MSW waste stream from regulation under Subtitle C. *See* 45 Fed. Reg. 33,084, 33,120 (1980). Congress's subsequent enactment of § 3001(i) expressly ratified the Household Waste Exclusion Rule and its exemption of the entire MSW stream from regulation under Subtitle C. As the Senate Report stated, "[a]ll waste management activities of . . . [a resource recovery] facility, including the generation, transportation, treatment, storage and disposal of waste shall be covered by the exclusion . . . ." S. Rep. No. 284, 98th Cong., 1st Sess 61 (1983).

3. Congress's purpose in exempting "resource recovery facilit[ies] recovering energy" in § 3000(i) was to promote the development of such facilities. The decision below undermines this purpose by substantially raising the cost of disposal of ash residue. As the EPA has noted, the national average cost for disposal of ash in a Subtitle D (non-hazardous waste) landfill is \$42 per ton; the national average cost for disposal of ash in a Subtitle C (hazardous waste) landfill is \$453 per ton. MWC Ash Memorandum at 7. The Seventh Circuit's rule places a crippling surcharge on the cost structure of resource recovery facilities which is likely to render many facilities economically unviable, thereby contravening the congressional purpose.

4. Finally, if the Court concludes that Section 3001(i) is ambiguous, the Court should nonetheless defer to the

EPA's reasonable interpretation of the statute as set forth in the 1992 MWC Ash Memorandum. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The court of appeals' refusal to accord deference—assertedly because of EPA's "waffling," Pet. App. at 16—mischaracterizes the EPA's position, which has consistently been that MSW Ash is not subject to regulation under Subtitle C. *See* 50 Fed. Reg. 28,702, 28,726 (1985). It also ignores the teaching of this Court that an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Chevron*, 467 U.S. at 863-64. Here, to the extent EPA has changed its position at all, it has done so in response to new scientific and administrative developments. *See* 40 C.F.R. pt. 258 (1992); MWC Ash Memorandum at 5 & n.5.

## ARGUMENT

### THE COURT OF APPEALS' INTERPRETATION OF SECTION 3001(i) CONTRAVENES THE PLAIN LANGUAGE OF THE STATUTE AND CONGRESS'S PURPOSE IN ENACTING IT

As in any case of statutory construction, interpretation of § 3001(i) "begins with the language of the statute itself." *Pennsylvania Public Welfare Dept. v. Davenport*, 495 U.S. 552, 558 (1990). The usual "assumption [is] that the legislative purpose is expressed by the ordinary meaning of the words used." *Securities Industry Ass'n v. Board of Governors*, 468 U.S. 137, 149 (1984). However, "[i]n determining the meaning of [a] statute, [the court must] look not only to the particular statutory language, but [also] to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990); *see also K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

The court of appeals held that § 3000(i) does not exempt MSW ash "generated" during management of the



waste stream from Subtitle C regulation. The court of appeals' construction is erroneous, however, because it ignores the import of the inclusion by Congress in § 3001 (i) of the express statutory terms "treating," "disposing of" and "managing." The court of appeals' construction contravenes not only the plain language of the statute but also Congress's object and policy in enacting RCRA: that the entire MSW waste stream be excluded from regulation under Subtitle C in order to encourage the development and use of resource recovery facilities.

**A. MSW Ash Is A Treatment Residue That Is Excluded From Subtitle C Regulation Under The Express Terms Of Section 3001(i)**

In 1976 Congress enacted RCRA,<sup>28</sup> thereby overhauling the management of wastes in the United States. See 42 U.S.C. §§ 6901 *et seq.* Subtitle C of RCRA establishes a scheme for regulating hazardous wastes from "cradle to grave." *Environmental Defense Fund v. Environmental Protection Agency*, 852 F.2d 1316, 1318 (D.C. Cir. 1988), *cert. denied*, 109 S.Ct. 1120 (1989). This scheme involves regulation of hazardous wastes along a continuum, or "waste stream," composed of the generation,<sup>29</sup> transportation, treatment,<sup>30</sup> storage, and disposal<sup>31</sup> of the hazardous waste.<sup>32</sup>

Congress, however, recognized that even the hazardous wastes contained in MSW could be treated in an envi-

<sup>28</sup> Pub. L. No. 94-580, 1976 U.S.C.C.A.N. (90 Stat.) 2795 (1976) (codified as amended at 42 U.S.C. §§ 6901-6992(k)).

<sup>29</sup> In the context of hazardous waste, "generation" is defined as "[t]he act or process of producing hazardous waste." See RCRA § 1004(34), 42 U.S.C. § 6903(6).

<sup>30</sup> RCRA § 1004(34), 42 U.S.C. § 6903(34).

<sup>31</sup> RCRA § 1004(3), 42 U.S.C. § 6903(3).

<sup>32</sup> Subtitle D of RCRA provides a similar cradle to grave regulatory framework for non-hazardous wastes. See 42 U.S.C. §§ 6941-49.

ronmentally sound and financially less burdensome manner than is required by Subtitle C. Accordingly, Congress enacted Section 3001(i), which establishes an exclusion from Subtitle C regulation for resource recovery facilities that burn MSW in order to recover energy, as long as certain requirements are met. Section 3001(i) provides in relevant part:

[A] resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be *treating*, storing, *disposing of*, or otherwise *managing* hazardous waste material for the purpose of regulation under this chapter.

42 U.S.C. § 6921(i) (emphasis added). Congress thus exempted the operation of resource recovery facilities burning MSW to recover energy from RCRA's Subtitle C regime regulating the management of hazardous wastes, regardless of the characteristics of the waste being burned.

Respondents contend, *see* Op. Cert. 13-16, and the court of appeals held, *see* Pet. A. 18-20, that notwithstanding the express language of § 3001(i), petitioners must dispose of ash generated during the incineration of MSW as a hazardous waste under RCRA's Subtitle C. According to respondents and the court below, where the incineration of MSW "generates" a new hazardous waste, § 3001(i) requires incinerator ash to be managed as a hazardous waste under RCRA Subtitle C. This reading of § 3001(i), however, is contradicted by the statute's express use of language—"treating, storing, disposing of, or otherwise managing," 42 U.S.C. § 6921(i)—which manifests Congress's intent to exempt from regulation as a hazardous waste the entire MSW waste stream from generation by households through the post-incineration disposal of the ash residue.

Under RCRA, a material becomes a "solid waste" at the time it is first *discarded*. See 42 U.S.C. § 6903(27) (defining "solid waste" as "any garbage, refuse, . . . and other discarded material"); *cf. American Mining Congress*

*v. Environmental Protection Agency*, 824 F.2d 1177, 1193-94 (D.C. Cir. 1987).<sup>33</sup> MSW, including any hazardous waste component contained therein, is thus generated as a "solid waste" at the moment a person or business puts garbage out for pickup by a waste hauler for transport to a resource recovery facility.

Likewise, the next step in the process of managing the waste stream—the incineration or thermal treatment of MSW at the resource recovery facility—does not result in the "generation" of a new hazardous waste subject to regulation under RCRA's Subtitle C. To be sure, at this stage in the MSW stream, the most significant changes occur in the physical and chemical composition of MSW.<sup>34</sup> To the extent that incineration "generates" a new haz-

<sup>33</sup> RCRA § 1004(5), 42 U.S.C. § 6903(5), defines hazardous waste as a subset of solid waste. 40 C.F.R. §§ 261.2 and 261.3 (1992) set forth, respectively, the regulatory definitions of solid and hazardous waste.

<sup>34</sup> In this process, organic, carbon-based, compounds are decomposed, leaving an ash containing a non-burnable metallic residue. This ash is not a newly "generated" waste, but the residue of a process which changed the physical and chemical composition and character of the MSW. The metallic constituents of the ash are the same as the metallic constituents of the MSW received by the facility; they are simply concentrated into a volume approximately one-tenth as large because the organic compounds have been burned away. Because of the concentration of metals in the ash, the ash may sometimes demonstrate "toxicity," a characteristic of hazardous waste, when tested using EPA's Toxic Characteristics Leaching Procedure ("TCLP"). See 40 C.F.R. § 261.24 and pt. 261 App. II (1992). TCLP is a test of the concentration at which metals such as lead and cadmium will leach from a material. See *Edison Elec. Inst. v. Environmental Protection Agency*, Nos. 90-1320-1324, slip op. at 6-8 (D.C. Cir. Aug. 6, 1993) (describing TCLP). Because the concentration at which metals leach from a material is likely to be greater the higher the concentration of metals in a material, burning away the organic compounds in MSW increases the likelihood that the concentration of leachate in the ash residue will exceed the TCLP test. As explained *supra* at p. 5 n.16, however, recent field studies indicate that the lead and cadmium concentrated in MSW ash do not pose a significant leachate problem.

ardous waste, however, Congress has expressly exempted this process from regulation under Subchapter C. See 42 U.S.C. § 6921(i). Having defined "treatment" as "any method, technique or process . . . designed to change the physical, chemical or biological character or composition of any hazardous waste so as to neutralize such waste or so as to render such waste nonhazardous, *safer for transport, amenable for recovery, amenable for storage, or reduced in volume*," 42 U.S.C. § 6903(34) (emphasis added)—language which plainly encompasses the process of incineration—Congress has clearly expressed its intent to exclude ash residue from regulation as a hazardous waste under Subtitle C, regardless of its characteristics. As the plain language of § 6903(24) demonstrates, the "treatment" of hazardous waste does not include only those processes which render the waste "nonhazardous." Rather, it also encompasses those processes which do not render the waste "nonhazardous" so long as they "change the physical, chemical, or biological character or composition . . . so as to render such waste . . . safer for transport, amenable for recovery, amenable for storage, or reduced in volume." 42 U.S.C. § 6903(24). Congress was thus clearly aware that not all processes used to treat hazardous waste render that waste "nonhazardous." Nonetheless, in enacting § 3001(i), it chose to exempt the "treatment" of MSW from Subtitle C.

Accordingly, for purposes of RCRA, in incinerating MSW and producing ash a resource recovery facility is *treating* pre-existing municipal solid waste that has already been generated, not creating a new hazardous waste. And foreshadowing Congress's intent in enacting § 3001(i), EPA properly described MSW ash as a "treatment residue." See 45 Fed. Reg. 33,084, 33,099 (1980) ("[Residues] remaining after treatment (e.g., incineration, thermal treatment) are not subject to regulation as hazardous waste.").

The resource recovery facility's disposal of MSW ash in a landfill after mass burning is likewise within the scope



of the § 3001(i) exemption. In the ordinary course of the "mass burning" of MSW, a resource recovery facility does not engage in the "discharge, deposit, injection, dumping, spilling, leaking or placing of any solid waste or hazardous waste into or on any land or water . . . ." 42 U.S.C. § 6903(3). Rather, it is only after the facility completes incineration that it engages in the "deposit," "dumping," "or placing of any solid waste or hazardous waste into or on any land", *id.*, by "disposing of" the ash residue. 42 U.S.C. § 6921(i). Such disposal, however, is plainly encompassed within § 3001(i)'s exemption. Simply stated, this is because if Congress's use of the language—"a resource recovery facility recovering energy from the mass burning of municipal solid waste shall not be deemed to be . . . disposing of . . . hazardous waste"—is to have any meaning, it must refer to the facility's subsequent "dispos[al] of" MSW ash. As EPA recently noted in its September 1992 MWC Ash Memorandum, "the burning of such waste generally is regarded as a type of treatment under RCRA. . . . MWC ash ordinarily is the only waste "disposed of" by such a facility." MWC Ash Memorandum at 3 (internal citations omitted).

As the foregoing demonstrates, the entire process is one of *managing* the MSW stream, in other words, "[t]he systematic control of the collection, source separation . . . transportation . . . treatment, recovery, and disposal" of the waste. 42 U.S.C. § 6903(7) (emphasis added). By expressly including in § 3001(i) the terms "treating," "disposing of" and "managing," Congress manifested its intent to exempt the entire continuum of MSW management from regulation under RCRA's Subtitle C hazardous waste regime.

In reaching its conclusion that MSW ash does not fall within the scope of the exclusion, the court of appeals reasoned that the terms used in § 3001(i), *i.e.*, "otherwise managing," "treating," and "disposing of," are not "coextensive" with the term "generating" and that their "definitions exclude 'generation.'" Pet. App. 18-19.

In doing so, however, the court of appeals effectively read the former terms out of the statute. Contrary to the reasoning of the court of appeals, the term "treatment" expressly encompasses the changes in physical and chemical composition and character which occur during the creation of ash residue by incineration. *See* 42 U.S.C. § 6903(34). And RCRA's definition of "treatment" includes processes which do not render waste "nonhazardous" so long as they "render such waste . . . safer for transport, amenable for recovery, amenable for storage, or reduced in volume." *Id.*

Likewise, the term "management" embraces such activities as the "processing, treatment, and disposal" of wastes, *see* 42 U.S.C. § 6903(7) (defining "hazardous waste management") which, too, embraces the incineration of MSW and subsequent disposal of ash residue. *See also* 42 U.S.C. § 6903(3) (defining "disposal" as the "deposit . . . dumping . . . or placing of any solid waste or hazardous waste into or on any land . . .").

As the foregoing demonstrates, the statutory definitions of the terms Congress employed in enacting § 3001(i)'s exemption clearly embrace the entire MSW stream from its generation by households through the post-incineration disposal of ash residue. The court of appeals' failure to give operative effect to the very language which Congress employed in § 3001(i) and RCRA's statutory definitions thus violates the fundamental canon of statutory construction that each word in a statute be given effect. *See, e.g., United States v. Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992); *Crandon*, 494 U.S. at 171. This, by itself, is reason to reverse the judgment of the court below.

#### **B. The History Of § 3001(i) Demonstrates That Congress Intended To Exempt The Entire MSW Stream From Regulation Under Subtitle C**

The history of § 3001(i) supports our reading of the plain language. Consistent with congressional resource recovery policies and the MSW regulatory scheme em-

bodied in RCRA, in 1980 EPA promulgated the Household Waste Exclusion Rule which provided the basis for the statute which Congress adopted four years later as Section 3001(i). *See* 45 Fed. Reg. 33,084, 33,120 (1980) (codified at 40 C.F.R. § 261.4(b)(1) (1992) as amended). EPA's rule excluded the entire household waste stream from Subtitle C regulation. Although EPA knew when it promulgated the regulation that a small amount of hazardous waste would be included in the MSW waste stream, the agency nonetheless concluded that Congress's intent was best served by excluding the entire waste stream from Subtitle C regulation:

The Senate language makes it clear that household waste does not lose the exclusion simply because it has been collected. Since household waste is excluded *in all phases of its management, residues remaining after treatment (e.g., incineration, thermal treatment)* are not subject to regulation as hazardous waste.

45 Fed. Reg. 33,099 (1990) (emphasis added). Hence, as a category of waste, household waste, including ash residue remaining after treatment, was explicitly excluded from regulation as a hazardous waste. The rationale for this exclusion was not based on the *content* of the MSW waste stream, but rather on the express congressional policy of excluding *the entire* waste stream—"in all phases of its management"—from the hazardous waste regulations regardless of whether it could be classified as hazardous waste on account of the characteristics of its constituents. *See id.* at 33,097.<sup>35</sup>

<sup>35</sup> Discussing the hazardous waste regulatory scheme in the preamble to the regulation, EPA acknowledged that the system was imperfect:

This system may not work perfectly for every waste however. It may overregulate in some instances and underregulate in others. This is an unavoidable consequence of attempting to

When Congress enacted the Hazardous and Solid Waste Amendments of 1984, Pub. L. No. 98-616, 1984 U.S.C.C.A.N. (98 Stat.) 3221 (codified at various parts of RCRA) (hereinafter "1984 RCRA Amendments"), it expressly ratified EPA's interpretation of legislative intent with respect to MSW by enacting the "Clarification of Household Waste Exclusion" as Section 3001(i).<sup>36</sup> Section 3001(i) thus codified the household waste exclusion rule promulgated by EPA. Congress also clarified that the exclusion removed the entire household waste stream from the Subtitle C hazardous waste regime and that it applied to resource recovery facilities which burned and derived energy from MSW.

The intent behind the clarification is stated in S. Rep. No. 284, 98th Cong., 1st Sess. (1983), the Senate report accompanying the Senate amendments to the original House bill, and agreed to by the Conference Committee.<sup>37</sup> Recognizing that it was important to encourage commercially viable resource recovery facilities and to remove impediments that may hinder their development and operation, Senate Report 284 indicated that new Section 3001(i) clarified Congress' original purpose to include within the household waste exclusion *all* the waste management activities of a resource recovery facility which recovered energy from the mass burning of household

develop a national hazardous waste management program which has to regulate thousands of wastes.

*Id.* at 33,088-89 (emphasis added). Despite this imperfection, EPA, in accordance with the policy choice made by Congress, struck the balance in favor of underregulation in order to promote the important public policy of providing local governments with flexibility in handling their MSW and encouraging resource recovery.

<sup>36</sup> *See* 1984 RCRA Amendments § 223, 1984 U.S.C.C.A.N. (98 Stat.) 3252 (codified as amended at 42 U.S.C. § 6921(i)).

<sup>37</sup> *See* H.R. Conf. Rep. No. 1133, 98th Cong., 2d Sess. 106 (1984), reprinted in 1984 U.S.C.C.A.N. 5576, 5677.



waste and nonhazardous waste from other commercial sources, as long as the facility took precautions against accepting hazardous waste from commercial sources.

All waste management activities of such a facility, including the *generation*, transportation, treatment, storage and disposal of waste shall be covered by the exclusion, if the limitations in paragraphs (1) and (2) are met.

S. Rep. No. 284 at 61 (emphasis added). Significantly, the Senate Report included "generation" in its explanation of the provision proposed as Section 3001(i), even though the language of that provision did not include the term. The Conference Committee adopted, without change, the Senate version of Section 3001(i).

The unambiguous statement by the Senate that all MSW waste management activities by a resource recovery facility are covered by the Section 3001(i) exemption confirms that "Congress clearly knew of the EPA's interpretation of the 1980 regulation" and agreed with it. *Environmental Defense Fund, Inc. v. Wheelabrator Technologies, Inc.*, 725 F. Supp. 758, 765-66 (S.D.N.Y. 1989), *aff'd*, 931 F.2d 211 (2d Cir.), *cert. denied*, 112 S. Ct. 453 (1991). Moreover, the statement confirms that Congress expressly intended MSW ash—the treatment residue—to be within the scope of Section 3001(i)'s exemption.

### C. The Court Of Appeals' Interpretation Contravenes The Congressional Purpose Underlying Section 3001(i)

Even if the Court deems it necessary to look beyond the plain language and history of Section 3001(i), it must still reject the court of appeals' construction because it is demonstrably at odds with the object and policy of the statute. *Crandon*, 494 U.S. at 158.

As described below, Congress, in enacting RCRA and subsequent amendments thereafter, including § 3001(i),

has consistently sought to promote resource recovery as an option for managing MSW in order to save scarce landfill space and facilitate energy recovery. In promoting this goal, Congress intended that the management of the entire MSW waste stream—including the ash remaining after incineration of MSW—be kept separate and apart from RCRA's hazardous waste management regime. The court of appeals simply ignored Congress' "object and policy" in enacting the statute. *Crandon*, 494 U.S. at 158. Its holding thus undermines the congressional purpose in enacting RCRA and § 3001(i).

### 1. The Court of Appeals' Decision Contravenes the Congressional Purpose of Promoting the Development of Resource Recovery Facilities

In enacting RCRA, one of Congress' fundamental objectives was promoting resource recovery as an approach to managing MSW. Congress recognized the increasing scarcity of land available to metropolitan areas caused by landfilling of MSW and concluded that resource recovery facilities should be promoted both as an alternative to landfilling and as an independent source of energy. H.R. Rep. No. 1491, 94th Cong., 2d Sess. 3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240. *See also* RCRA § 1002(b)(8) & (d), 42 U.S.C. § 6901(b)(8) & (d).<sup>38</sup>

Congress's purpose of promoting the incineration of MSW to produce energy as a primary means of resource

<sup>38</sup> Demonstrative of its purpose of promoting the development of MSW resource recovery, Congress authorized technical as well as research and development aid to localities developing resource recovery facilities under Subtitles B and D of RCRA. *See* RCRA §§ 2003 & 4008, 42 U.S.C. §§ 6913, 6948. Congress also authorized EPA to promulgate rules and guidelines to assist States in implementing resource recovery plans and to specifically consider appropriate types of resource recovery facilities for a variety of state and municipal situations. *See* RCRA § 4002(c)(10), 42 U.S.C. § 6942(c)(10).

recovery is amply reflected throughout the legislative history of RCRA. For example, the House Report explained that Section 4003 of RCRA, 42 U.S.C. § 6943, allowed state and local governments the flexibility needed to develop alternative disposal systems by "requir[ing] that the discarded materials be utilized by a resource recovery facility for the recovery of energy . . . or that such discarded materials be disposed of . . . by [an] environmentally sound method of disposal, *including incineration* that does not conflict with the Clean Air Act." H.R. Rep. No. 1491, at 78-79 (emphasis added).<sup>39</sup>

Four years after the passage of RCRA, Congress reaffirmed its objective of promoting the development of resource recovery facilities by enacting Section 32 of the Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, 1980 U.S.C.C.A.N. (94 Stat.) 2334 (codified at various parts of Subtitle D of RCRA). Section 32 amended RCRA to improve and augment federal programs for energy and resource recovery assistance to States and municipalities by authorizing the EPA to provide (1) grants to States and municipalities in order to facilitate waste-to-energy feasibility and developmental planning and, (2) technical assistance in order to remove impediments to the development of energy recovery.

As RCRA and its 1980 amendments demonstrate, the Congressional purpose underlying RCRA and § 3001(i) was to promote the recovery of energy by excluding from Subtitle C's regulatory scheme the MSW waste

<sup>39</sup> See also H.R. Rep. No. 1491, at 88-89, reprinted in 1976 U.S.C.C.A.N. 6324 (detailing the composition of the MSW stream, and comparing the energy yields from incineration of MSW and coal in terms of the British Thermal Unit value per pound each contain, as well as their respective ash content equivalents); 122 Cong. Rec. H11147, H11153 (Sept. 27, 1976) (statement of Rep. Myers) (RCRA represents a "major congressional commitment" to recapture the discarded "millions of tons of paper, valuable metals, glass, and other waste materials which could be reused or burned for their energy value.") (emphasis added).

stream in "all phases of its management," including treatment by incineration and disposal of the ash residue resulting from such treatment. The court of appeals' construction of § 3001(i) undermines this purpose, effectively rendering the statute a nullity by creating a great economic disincentive to the development and continued use of resource recovery facilities.

Even though incineration reduces the mass of MSW by approximately seventy-five percent, see *Solid Waste Management* at 117, the high cost of disposing of MSW ash in Subtitle C landfills—estimated by EPA at an average of \$453 per ton nationwide, MWC Ash Memorandum at 7—more than offsets the benefit of incineration. Indeed, the surcharge which the Seventh Circuit has imposed—more than \$410 per ton if the national average disposal costs for ash in Subtitle C (\$453) and D (\$42) landfills is used—will simply render existing and proposed facilities economically unviable. Even with the reduction in the waste mass gained by incineration, landfilling untreated waste will be far cheaper than the cost of incinerating the waste and disposing of it in a Subtitle C landfill. See *supra* p. 8 & n.26. Faced with this surcharge to the cost structure of resource recovery facilities, investments in such facilities will no longer be made. And the economic costs imposed by the court of appeals' holding will result in municipalities abandoning their use of resource recovery facilities in favor of the least-cost alternative of landfilling untreated waste—thus undermining Congress's purpose of promoting the use of such facilities.

#### **D. If The Language Of The Statute Is Ambiguous And The Legislative History Inconclusive, The Court Should Defer To EPA's Interpretation**

Finally, if the Court concludes that the language of Section 3001(i) is ambiguous and the legislative history is inconclusive, the Court should defer to the EPA's reasonable interpretation of the statute as set forth in the



1992 MWC Ash Memorandum. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As this Court noted in *Chevron*, when a

court determines [that] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 843 (footnotes omitted); see also *Rust v. Sullivan*, 111 S.Ct. 1759, 1767 (1991); *Sullivan v. Everhart*, 494 U.S. 83, 89 (1990) ("agency's interpretation must be rational and consistent with the statute"). To be a permissible construction, "[t]he court need not conclude that the agency's construction was the only one it could permissibly have adopted . . . or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11.

As Judge Ripple cogently explained in his dissent below, EPA's MWC Ash Memorandum was a responsible attempt to resolve a major environmental policy question in a situation where two courts of appeals had reached diametrically opposed decisions on a question of statutory interpretation. Pet. App. 3-4. EPA's interpretation is permissible as it is both rational and consistent with the statute: EPA's interpretation is based on giving operative effect to all the terms of § 3001(a) and comports with both Congress's intent and its underlying policy of promoting resource recovery.

In refusing to accord deference to the EPA's Ash Memorandum, the court of appeals reasoned that the agency had "waffl[ed]" in interpreting section 3001(i) and was

thus no longer entitled to deference. See Pet. App. at 16. The court of appeals' reasoning, however, is directly contrary to the teachings of this Court. As this Court noted in *Chevron*, "[a]n agency interpretation is not instantly carved in stone." 467 U.S. at 863. Particularly when an agency policy is predicated on certain scientific and technical judgments which may continue to evolve, "the agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." *Id.* at 863-64; see also *Rust*, 111 S.Ct. at 1759 (An agency "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" (citations omitted)).

It is thus incorrect to portray the EPA as having "waffled." Granted, the preamble to EPA's 1985 amendment of the Household Waste Exclusion Rule displays the EPA's careful consideration of whether to regulate MSW ash as a hazardous waste.<sup>40</sup> Nonetheless, EPA continued to view § 3001(i) as exempting MSW ash from regulation as a hazardous waste under Subtitle C. See 50 Fed. Reg. 28,702, 28,726 (1985). And when, in 1992, EPA finally undertook a detailed analysis of Section 3001(i), it definitively resolved the issue by concluding that MSW ash is excluded from hazardous waste regulation. Significantly, EPA resolved the issue without departing from the view it took in the 1980 promulgation of the Household Waste Exclusion Rule and its other interim pro-

<sup>40</sup> Notwithstanding this language, EPA continued to take the position in its regulatory and enforcement actions that MSW ash remained excluded from hazardous waste regulation under Section 3001(i). As EPA stated in the 1985 preamble:

EPA does not believe the HWSA imposes new regulatory burdens on resource recovery facilities that burn household and other non-hazardous waste, and the Agency has no plans to impose additional responsibilities on these facilities.

50 Fed. Reg. 28,702, 28,726 (1985).

nouncements that MSW ash residue was exempt from regulation under Subtitle C.<sup>41</sup>

Moreover, even if EPA has changed its interpretation of Section 3001(i), that does not compel the conclusion that the agency's most recent view is not to be afforded deference. As *Chevron* instructs, an "agency, to engage in informed rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis." 467 U.S. at 863-64; *see also Rust*, 111 S.Ct. at 1769. Just as in *Chevron*, where the Court deferred to EPA (recognizing that the agency had reconsidered its policy in light of changing circumstances, *see* 467 U.S. at 857-58), in this case EPA has reconsidered the technical and policy issues posed by MSW ash in light of new developments. Here, EPA's conclusion that MSW ash "can be regulated in a manner that will be protective of human health and the environment under Subtitle D," MWC Ash Memorandum at 5-6, is based on the agency's assessment that the promulgation of stricter criteria for MSW landfills receiving MSW ash will adequately safeguard the environment. *See* 40 C.F.R. pt. 258 (1992), 56 Fed. Reg. 50,978 (1991); MWC Ash Memorandum at 5 & n.5.<sup>42</sup> Thus, far from being instances of "waffling," EPA's current and former pronouncements fall well within the "ample latitude" given the agency to "adapt its rules to the demands of changing circumstances," and to consider on a continuing basis "varying interpretations" of the statute and the "wisdom of its policy." *Rust*,

<sup>41</sup> In addition to EPA's conclusion in the preamble to the 1985 amendment of the Household Waste Exclusion Rule, EPA also concluded in 1991, when it adopted the more stringent solid waste landfill criteria, that until Congress speaks to the issue EPA will continue to regulate MSW ash under Subtitle D. *See* 56 Fed. Reg. 51,040 (1991).

<sup>42</sup> As previously noted, these regulations impose stringent requirements for the construction and maintenance of MSW landfills, including requirements expressly designed to prevent the leaching of metals. *See* n.15, *supra*.

111 S.Ct. at 1769. As the agency having expertise over the subject matter of the statute, EPA's view was entitled to deference.

### CONCLUSION

The judgment of the court of appeals should be reversed.

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